

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BRUCE ALLISTON TATE,

Defendant-Appellee.

UNPUBLISHED

July 30, 2013

No. 310847

Jackson Circuit Court

LC No. 04-001433-FC

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his convictions of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b, and one count of second-degree CSC, MCL 750.520c. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

Defendant's convictions arose from allegations brought by his great-niece, the complainant in this case. Defendant lived in Jackson County with the complainant and her mother and grandmother. In 2004, when the complainant was age 14, she disclosed to a friend that defendant had been sexually abusing her for at least the past nine years. The friend reported the disclosure to a police officer, who interviewed the complainant. She reiterated the allegations, and the Jackson police then contacted defendant. Defendant denied the allegations. The police did not place defendant under arrest, but advised him not to reside with the complainant. Defendant subsequently moved to Ohio to live with relatives. An arrest warrant was issued in 2004, but defendant was not arrested until 2011.

In 2012, the case went to trial. The complainant, then age 21, testified that defendant sexually abused her several times every month. She testified that the abuse did not initially include intercourse. Starting at age 11, however, defendant's abuse included vaginal and anal intercourse. In response, defendant testified at trial and denied the allegations. The jury found defendant guilty on all counts.

Defendant first argues on appeal that the trial court erred by failing to instruct the jury that they must reach a unanimous verdict regarding specific acts of sexual abuse. However, defendant waived this challenge to the jury instructions by approving the instructions at trial. *People v Eisen*, 296 Mich App 326, 328-329; 820 NW2d 229 (2012). "A stipulation constitutes a waiver of any alleged error, so there is no error for us to review." See also, *People v Carter*,

462 Mich 206, 215; 612 NW2d 144 (2000); *People v Kowalski*, 489 Mich 488, 503-508; 803 NW2d 200 (2011).

Defendant next argues that his counsel was ineffective for approving the instructions, and for failing to object to the prosecutor's amendment of the Information to delete descriptions of penetration in Count 2. We review defendant's challenge for errors by counsel that are apparent from the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). To prevail on his claim of ineffective assistance of counsel, defendant must show not only that counsel made errors; defendant must show that the errors were so serious that the result of the trial was unreliable. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Specifically, defendant must establish that counsel's "representation fell below an objective standard of reasonableness." *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In addition, defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In this case, defense counsel's approval of the Information amendment and of the jury instructions was objectively reasonable. The trial court provided the jury with a general instruction that the verdict must be unanimous. A general instruction on the unanimity requirement is typically sufficient in a criminal trial. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). Our Supreme Court identified the two factors that warrant a more specific unanimity instruction in a CSC case involving multiple acts of abuse:

when the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if [1] the acts are materially distinct or if [2] there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. [*Cooks*, 446 Mich at 530.]

Neither of these factors is present in this case. Regarding the first factor, the complainant testified that the abusive acts of penetration occurred regularly, and she did not describe any material distinction between the acts. She stated that defendant subjected her to penile penetration several times each month, always in the basement of the house, beginning when she was age 11 and continuing until she reported the abuse at age 14. Accordingly, there was no testimony to establish materially distinct acts of CSC in this case.

Similarly, the record contains nothing to indicate that the jurors were confused, or that they disagreed about the fact of penetration. Although the jury did ask questions about the police investigation, the jury never indicated that there was confusion about whether acts of penetration occurred. Moreover, defendant presented nothing to challenge any particular act of penetration. Rather, defendant comprehensively denied that any act of CSC ever occurred. As such, the jury's inquiry involved credibility about the general allegations, not about the timing, location, or specific acts of penetration. Absent any indication of juror confusion or of materially distinct evidence of particular acts, defendant has not established that a specific unanimity instruction was necessary. Further, the amendment of the information did not materially alter the proof required. The complainant testified to repeated incidences of sexual penetration, and the additional specificity in the original information added no particular burden to prove a single act.

Consequently, counsel cannot be deemed ineffective for failing to object to the instructions or to the amendment of the Information. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (counsel need not raise a futile objection).

Even if we were to find that trial counsel was ineffective in failing to object to the amendment, defendant cannot demonstrate the necessary prejudice necessitating reversal. Even assuming that defense counsel had objected, and the trial court had ruled in favor of defendant, defendant does not cite to any evidence, and we find none, that would lead us to conclude that but for this error the result of the proceeding would have been different. *Strickland*, 466 US at 694.

Next, defendant argues that the prosecutor engaged in misconduct by questioning defendant about the credibility of other witnesses, by interjecting facts not in evidence, and by attempting to shift the burden of proof to defendant. These types of conduct by a prosecutor may constitute misconduct. See *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). To determine whether misconduct occurred, we evaluate the prosecutor's conduct in context, in light of the defense arguments. *Id.*

Defendant did not object to the alleged acts of misconduct at trial, so we review the conduct for plain error affecting defendant's substantial rights. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Reversal is warranted if this Court determines that "although defendant was actually innocent, the plain error caused him to be convicted, or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004) (quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003)).

We find no misconduct that warrants reversal of defendant's convictions. The prosecutor's questions about credibility were in large part responsive to defendant's testimony. During direct examination of defendant, defense counsel asked defendant whether he had heard the complainant's testimony. Defendant acknowledged that he heard the testimony, and stated that the testimony was untrue. In addition, defense counsel asked defendant whether he ever kept items of the complainant's clothing in his room. Defendant denied having the clothing, and denied that he ever had the specific items of clothing another witness claimed to have found in defendant's room. Defendant further denied on direct examination that he ever made inappropriate comments about young girls.

The prosecutor's questions to defendant on cross-examination were responsive to this testimony. Given that defendant had already directly challenged the veracity of the testimony of other witnesses, the prosecutor's follow-up questioning cannot be deemed plain error. See *Dobek*, 274 Mich App at 70-73 (no reversible error for prosecutorial misconduct when defendant had raised certain issues on direct examination). Absent any misconduct, we cannot find defense counsel ineffective for failing to object to the questioning. *Ericksen*, 288 Mich App at 201.

We also conclude that the prosecutor's closing argument was responsive to defendant's testimony, and was derived from facts in evidence. Defendant presented a witness that attested to an awareness of the general characteristics of pedophiles as portrayed in the media. The prosecutor addressed similar characteristics in closing argument. In response, defense counsel

appropriately argued that general characteristics were not at issue in this case. Defense counsel emphasized to the jury that the issue in this case was whether the prosecutor had proven the alleged sexual abuse beyond a reasonable doubt.

Lastly, defendant maintains that the prosecutor impermissibly shifted the burden of proof to defendant by presenting arguments about defendant's failure to remain in contact with the Jackson police. In closing argument and in rebuttal, the prosecutor stressed that defendant's lack of communication with the police after he moved to Ohio was evidence of defendant's guilt. The prosecutor also stressed, however, that defendant had no obligation to prove anything at trial, and that the burden was on the prosecutor to establish defendant's guilt.

The prosecutor's acknowledgement of the burden of proof clarified for the jury the significance, if any, of defendant's lack of communication with the Jackson police. Even if the prosecutor's conduct references to defendant's lack of communication with the police were improper, reversal would not be warranted. This case primarily involved credibility assessments, and this Court defers to a jury's superior ability to assess the credibility of witnesses. *Bennett*, 290 Mich App at 472. Further, the trial court addressed any prejudice arising from the prosecutor's comments by instructing the jury that they must consider only the evidence presented, and that lawyers' comments are not evidence. This instruction was sufficient to resolve any prejudice from the prosecutor's argument. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Michael J. Kelly